

POLITICAL SCIENCE 271
AMERICAN CONSTITUTIONAL LAW I:
THE FOUNDING TO SECESSION
Prof. Kimberly Smith
Fall 2011
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This course explores the development of American constitutional law from the founding era to the secession crisis. We'll focus not only on constitutional doctrine but also on the broader intellectual and political context in which it evolved. Topics will include the intellectual origins of the Constitution, the Constitutional Convention and ratification, the development of the judiciary and centralization of federal power, the role of natural law in constitutional adjudication, the constitutional issues revolving around slavery, and the constitutional conflict that led to the nullification and secession crises.

Texts: Kelly, Harbison and Belz, *The American Constitution*, Vol. I (7th ed.)
Amar, *The Bill of Rights*
Additional readings in coursepack and on reserve

Course requirements: The course will consist of lecture and discussion. You are expected to complete the readings before class so that you can come to class prepared to listen attentively and engage in a lively and thoughtful discussion.

Your grade will be computed as follows:

Bill of rights presentation:	15%
Judicial opinion:	5%
Midterm:	20%
Final:	30%
Research Paper:	20%
Participation	10%

Participation and Attendance:

This class emphasizes oral presentation skills. Each student should be prepared to explain the assigned reading and answer searching questions about it every day. Students may be asked to summarize the facts of the assigned case(s), explain the Court's reasoning and the holding, explain the reasoning of the dissenting opinions, if any, and critique the Court's decision.

Because this in-class discussion is a critical part of learning to read and analyze cases, attendance is very important and missing classes may affect your grade substantially. **However, if you suspect you have the flu, please do not come to class!** Call Health Services for a phone-triage.

Group project: The Bill of Rights

Each group will be assigned one question. The group's task is to research and develop two opposing views of how the Framers would have answered the question. The presentation will take the form of an oral argument: one student should serve as "lead counsel" for the affirmative side, a second student should serve as "lead counsel" for the negative side. A third student should be prepared to offer a rebuttal for the affirmative side and the fourth student should do the rebuttal for the negative side. The rest of the class will judge the winner and write up individual 2-page "opinions" justifying their decision.

You should keep your arguments confined to the *original intent* of the Framers; for this project, you do not need to consider other kinds of arguments. Proceed as though the original intent is relevant to deciding the issue.

You will receive 10 minutes to present each side, and 5 minute for each rebuttal (30 minutes total). **Be prepared for the judge to interrupt your presentation with questions.**

Your group will receive a collective grade.

- The rest of the class will be expected to write up opinions based on your oral argument, so it's useful to provide a PowerPoint presentation with your main points, even if you don't get the chance to go through the whole thing. You should post your ppt on the moodle discussion forum.
- You should draw on scholarly sources such as Amar, Levy, and law review articles, but you **must** also use historical documents such as the records of the Constitutional Convention, the Federalist Papers and Antifederalist Papers, and other documents providing evidence of the Framers' intent. (Evidence concerning historical practices may also be relevant.)
- In developing your arguments, you should give some thought to who is included in "the Framers" and how specific their intent must be to count (for example, you might argue that they intended to outlaw cruel punishments even if they didn't intend to outlaw a particular practice that they didn't consider cruel, but we do).
- In addition to your presentation, your group should turn in a bibliography of the sources it relied on. Please follow *The Chicago Manual of Style* in documenting your sources. (*The Chicago Manual of Style* is available in the reference section of the library).

Questions:

1. The Establishment Clause prevents states from encouraging religion, for example by allowing school prayer.
2. The First Amendment prevents states from censoring seditious speech
3. The Second Amendment prevents the states from banning guns.
4. Jurors should be allowed to acquit a defendant when they believe the law under which the defendant is charged is unconstitutional or unjust ("jury nullification" or "jury review").
5. The Eighth Amendment prohibits the death penalty.
6. There is a constitutional right to privacy.

Resources: The Kelly, Harbison and Belz text and Amar's The Bill of Rights will be useful. The following sources will also be helpful. However, you should seek out additional sources. You will be evaluated in part on the depth and breadth of your research.

On reserve:

- Hickok, ed., *The Bill of Rights: Original Meaning and Current Understanding*
Levy, *Origins of the Bill of Rights*
Kramnick, ed., *The Federalist*
Storing, ed. *The Complete Antifederalist*
Levy, *The Origins of the Fifth Amendment* (1986)

In Reference section:

- Cogan, *The Complete Bill of Rights*

Kurland & Lerner, The Founders' Constitution

On Lexis:

- Higginson, A Short History of the Right to Petition Government, 96 Yale LJ 142 (1986)
Schauer, Role of the People in First Amendment Theory, 74 CLR 761 (1986)
Curry, The First Freedoms: Church and State in America to the Passage of the First Amendment (1986)
Mayton, Seditious Libel and the Lost Guarantee of Freedom of Expression, 84 Columbia LR 91 (1984)
Kates, Handgun Prohibition and the Original Meaning of the 2nd Amendment, 82 Mich LR 204 (1983)
McConnell, The Origins and Historical Understanding of the Free Exercise of Religion, 103 Harv. L.R. 1409 (1990)
Hamburger, A Constitutional Right of Religious Exemption: An Historical Perspective, 60 Geo. Wash. LR 915 (1992)
Halbrook, What the Framers Intended: A Linguistic Analysis of the Right to Bear Arms, Law & Contemp Prob (Winter 1986)
Stuntz, The Substantive Origins of Criminal Procedure, 105 Yale LJ 393 (1995)
Wolfram, The Constitutional History of the Seventh Amendment, 57 Minn LR 639 (1973)

Writing Opinions on the Bill of Rights Questions

After each debate on the Bill of Rights, you will act as a judge and write a short opinion explaining how you would rule on the question and why. The goal of this exercise is to help you master the art of legal writing and analysis. You should adopt the voice of a judge; your paper should be clear, concise, and polished.

A good judicial opinion states the question briefly, announces the ruling, and then explains the judge's reasoning. The aim is to make the reasoning supporting the conclusion crystal clear. The judge should also carefully and respectfully explain and respond to counterarguments. Legal writing always aims for concision, so your paper should be no longer than 1000 words (about two pages, single-spaced).

You will write opinions for each of the five debates you don't participate in. I will give you feedback on each of them, but I will grade only the last one.

Research Paper: Case Note

Your assignment is to research a significant constitutional case and explain why it's important to the development of constitutional law, to constitutional politics, and to the development of the Court as a political institution. Your paper may be **no more than 15 pages** (12-pt font, 1 inch margins). Case notes are designed to explain the facts, reasoning and holding in a case in a concise and simple fashion. They are usually read by legal professionals, but they should be easily understood by an intelligent layperson. They follow a standard format:

I. Introduction: This should be brief and to the point. It should state your thesis.

II. Background: This section will discuss the specific facts of the case as well as any political, social, legal, or cultural contextual factors that you think will help to illuminate the case. It should conclude by telling us how the case got to the Supreme Court and what the major legal issues were.

III. Analysis of the Decision: This section will take us carefully, in a step-by-step analysis, through the reasoning in the Court's opinion and the concurring and dissenting opinions. You may ignore or only touch on the minor or technical issues; focus on the important ones.

IV. Significance: This section should discuss the important impacts of the decision, which may be social, economic, political or legal. Your research should alert you to a range of important consequences; this section should demonstrate your deep engagement with the scholarly literature.

V. Conclusion: A separate conclusion is optional.

You will turn in sections of the case note for me to comment on as indicated on the syllabus. You will then revise these sections and turn in a complete, polished case note on November 16.

Documenting sources: I expect you to do a significant amount of research on your case. A thoroughly researched paper will rely on many sources, drawing on both books and periodicals. Your bibliography should demonstrate that you've explored the best scholarship on the subject (which will typically mean that you should not rely on Internet sources, unless you can make the case that they're reliable and respected.) You should cite your sources; the conventions of legal scholarship demand that you carefully document your factual assertions. *PLEASE NOTE:* You should carefully document your sources on all drafts that you turn in.

Suggested cases: (You may choose a case not on this list; just clear it with me first.)

- Chisholm v Georgia, 2 Dallas 419 (1793)
- United States v Peters, 5 U.S. 115 (1809)
- Marbury v. Madison, 5 US 137 (1803)
- Martin v Hunter's Lessee, 14 US 304 (1816)
- Cohens v Virginia, 19 US 264 (1821)
- McCulloch v Maryland, 17 US 316 (1819)
- Fletcher v Peck, 10 US 87 (1810)
- U.S. v Hudson and Goodwin, 11 U.S. 32 (1812)
- Dartmouth College v Woodward, 4 Wheaton 518 (1819)
- Gibbons v Ogden, 22 US 1 (1824)
- Barron v Baltimore, 5 U.S. 243 (1833)
- Charles River Bridge v Warren Bridge, 36 US 420 (1837)
- Worcester v Georgia, 6 Peters 515 (1832) & Cherokee Nation v Georgia, 5 Peters 1 (1831)
- Prigg v Pennsylvania, 41 US 539 (1842)
- Luther v Borden, 7 U.S. 1 (1849)
- Ableman v Booth, 21 Howard 506 (1856)
- Dred Scott v Sanford, 60 US 393 (1857)

COURSE OUTLINE

Class 1: Introduction to legal research

*Choose a group for the Bill of Rights presentation

Foundations

Class 2: Intellectual Origins of the American Constitution

Kelly, Harbison & Belz (KHB), Ch. 3

Locke, Second Treatise; Blackstone, Commentaries [CP]

Class 3: What is a “Constitution”?

KHB, Ch. 4

Waldron, Precommitment and Disagreement [R]

Class 4: The Founding: Interpretations

KHB Ch. 5

Beard, Framing the Constitution; Roche, The Founding Fathers [R]

Class 5: The Founding: Structure and Controversies

KHB Ch. 6

Articles of Confederation; Constitution (in KHB)

Class 6: Political Theory of the Constitution

KHB Ch. 7

Federalist Papers #10, #39, #51 [CP]

Antifederalist essays (Centinel I, Federal Farmer I) [CP]

Class 7: Political Theory of the Constitution cont.

Federalist Papers #78, #80, #81 [CP]

Class 8: Does the Founding Matter?

Paul Brest, The Misconceived Quest for Original Understanding [R]

*Paper topics due in class

The Bill of Rights

Class 9: The Bill of Rights

Federalist #84 [CP]

Madison's Remarks on the Bill of Rights (Congressional Debates) [CP]

Barron v Baltimore, 5 U.S. 243 (1833) [CP]

Class 10: The Bill of Rights

Amar, Ch. 1-6

Class 11: Bill of Rights cont.

*Student presentations

***Opinions due by noon, Thursday Oct. 6

Class 12: The Bill of Rights cont.

*Student presentations

***Opinions due by noon, Sat. Oct. 8

Class 13: The Bill of Rights cont.

*Student presentations
***Opinions due by noon, Tues Oct. 11

Class 14: Seditious Libel and Freedom of Speech
KHB Ch. 8
Zenger's Case (Hamilton's summation) [CP]

Class 15: Federalism, Parties and the Constitution
Sedition Act & Congressional debate on repeal [CP]
Virginia and Kentucky Resolutions [CP]

BREAK

Class 16: MIDTERM EXAM

Judicial Review

Class 17: Building the Federal Judiciary
KHB Ch. 9, 10
Judiciary Act of 1789 [CP]
Antifederalist essay (Brutus 11) [CP]

Class 18: Establishing Judicial Review
Calder v Bull [CP]
Marbury v Madison [CP]
Eakin v Raub [CP]

*Research paper: Background section due, *properly documented* and with preliminary bibliography, in class.

Federalism

Class 19: Establishing Federal Judicial Supremacy
KHB Ch. 11
Cohens v Virginia, Martin v Hunter's Lessee [CP]
Fletcher v Peck [CP]

Class 20: Indian Removal
KHB Ch. 12
Cherokee Nation v Georgia
Worcester v Georgia

Class 21: Nullification
Nullification Proclamation [CP]
Jackson's Response [CP]
Calhoun, Disquisition on Government [CP]

Commerce Power

Class 22: The Extent of Federal Power
McCulloch v Maryland [CP]

Jackson's Veto Message [CP]

Class 23: Commerce Power

Gibbons v Ogden [CP]

Cooley v Bd. Of Wardens [CP]

Thomas More Law Center v Obama [R]

*Research paper: Analysis section and revised background section, *both sections properly documented*, due in class

Class 24: The Taney Court: Commerce Power, Police Power

KHB Ch. 13

Charles River Bridge v Warren Bridge [CP]

Slavery

Class 25: The Law of Slavery

KHB, Ch. 14

Prigg v Pennsylvania [CP]

Class 26: KHB Ch. 15

Ableman v Booth [CP]

Class 27: Dred Scott v Sanford [CP]

Class 28: Lincoln's First Inaugural Address [CP]

*Final draft of research paper due

Final Exam: Self-scheduled